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## NOTE

### Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights

*Before the Bar can function at all as a guardian of the public interests committed to its care, there must be appraisal and comprehension of the new conditions, and changed relationship of the lawyer to his clients, to his professional brethren and to the public. That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our Code of Ethics, to more fundamental consideration of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era.<sup>1</sup>*

#### I. Introduction

The American Bar Association Code of Professional Responsibility (the Code) states that attorneys should assist in improving the legal system.<sup>2</sup> Because of their education and experience, attorneys are especially qualified to recognize and help remedy deficiencies in that system.<sup>3</sup> Attorney criticism of the judiciary plays an important role in improving the legal system by exposing abusive behavior by judges. Because attorneys operate within the legal system, understand the judicial process, and are familiar with individual judges, attorneys are particularly suited to serve as a check on the judiciary. In fact, some commentators have considered attorney criticism of the judiciary a professional duty.<sup>4</sup>

Although the Code recognizes the duty of attorneys to criticize the judiciary, it does not adequately define the boundaries of acceptable attorney criticism. Because the Code's language is ambiguous and its rules inconsistent, the degree of first amendment protection afforded an attorney's criticism of the judiciary is unclear. Feeling a moral obligation to criticize publicly the conduct of a member of the judiciary, expose problems, or suggest improvements in the legal system, an attorney may believe his criticism is justified under the Code.<sup>5</sup> He may also contend that his criticism is protected under the first amendment. Traditionally, however, courts have construed the Code as restricting all attorney criticism of the judiciary.<sup>6</sup> The courts have based their decisions on one of two assumptions: (1) criticism of the judiciary tends to diminish public confidence in the legal system; or (2) attor-

1 ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preface (1975) (as amended 1977) [hereinafter cited as ABA CODE].

2 *Id.*, Canon 8.

3 *Id.*, EC 8-1.

4 See, e.g., H. DRINKER, LEGAL ETHICS 59-62 (1953); Warren, *In Conclusion: The Duty of Responsible Criticism*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 320, 323-24 (M. Paulsen ed. 1959); Comment, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*: King v. Jones, 6 HARV. C.R.-C.L. L. REV. 595 (1971).

5 See notes 46-48 *infra* and accompanying text.

6 See notes 54-55 *infra* and accompanying text.

neys relinquish certain rights in exchange for their special status as members of a regulated profession.<sup>7</sup> Most courts have rejected first amendment arguments, claiming that free speech considerations do not outweigh the state's interest in defending its public officials.<sup>8</sup>

The courts have imposed severe sanctions, including public reprimand, suspension, and even disbarment, for violations of the Code's restrictions on attorney criticism of the judiciary.<sup>9</sup> The fear of such sanctions often prevents attorneys from commenting on judicial performance which, in turn, endangers the legal profession's role as "guardian of the public interest."<sup>10</sup> Furthermore courts imposing such sanctions fail in their role as guardians of constitutional privileges.

This note considers the first amendment rights involved in attorney criticism of the judiciary in light of the Code's standards and the judicial interpretations of those sanctions.<sup>11</sup> A division of opinion in the lower courts and the propensity of the Supreme Court of the United States to recognize other constitutional rights of attorneys indicate a need to develop a uniform standard for evaluating attorney criticism which would no longer restrict first amendment rights.

7 See notes 56-73 *infra* and accompanying text.

8 See notes 93-96 *infra* and accompanying text. Restrictions on attorney criticism of the judiciary have been upheld in a variety of situations. See, e.g., *In re Terry*, 71 Ind. Dec. 333, 394 N.E.2d 94 (1979), *cert. denied*, 100 S. Ct. 1025 (1980), *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976), and *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971) (prohibiting attorney criticism of the opinion of a court); *State v. Russell*, 227 Kan. 897, 610 P.2d 1122 (1980); *In re Thatcher*, 80 Ohio St. 492, 89 N.E. 39 (1909) and *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956) (prohibiting attorney criticism of the conduct of a judge in his campaign for judicial office); *In re Whiteside*, 386 F.2d 805 (2d Cir. 1967) and *Eisenberg v. Boardman*, 302 F. Supp. 1360 (D. Wis. 1969) (prohibiting attorney criticism of the private activities of a judge). Attorneys have been disciplined for statements made in public. See, e.g., *In re Friedland*, 268 Ind. 536, 376 N.E.2d 1126 (1978); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971); *In re Lacey*, 283 N.W.2d 250 (S.D. 1979); *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956); *State Bd. of Law Examiners v. Spriggs*, 61 Wyo. 70, 155 P.2d 285 (1945). They have also been disciplined for statements made in legal documents filed in court. See, e.g., *In re Whiteside*, 386 F.2d 805 (2d Cir. 1967); *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968); *In re Philbrook*, 105 Cal. 471, 38 P. 884 (1895); *In re Shimek*, 284 So. 2d 686 (Fla. 1973); *Kentucky State Bar Ass'n v. Lewis*, 282 S.W.2d 321 (Ky. 1955); *Attorney General v. Nelson*, 263 Mich. 686, 249 N.W. 439 (1933). Restrictions on attorney criticism have even been upheld when the statement was made in good faith. See, e.g., *State ex rel. Florida Bar v. Calhoun*, 102 So. 2d 604 (Fla. 1958); *State ex rel. Florida Bar v. Edwards*, 102 So. 2d 610 (Fla. 1958); *Kentucky State Bar Ass'n v. Lewis*, 282 S.W.2d 321 (Ky. 1955).

9 See Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922 n.1 (1974). For a summary of the disciplinary procedures adopted by most states, see Note, *Self-Incrimination: Privilege, Immunity, and Comment in Bar Disciplinary Proceedings*, 72 MICH. L. REV. 84, 85 n.5 (1973).

Federal courts also have authority to discipline attorneys. See, e.g., *In re Whiteside*, 386 F.2d 805 (2d Cir. 1967); *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974); *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968); *Eisenberg v. Boardman*, 302 F. Supp. 1360 (D. Wis. 1969). Although federal courts make their own findings of fact, they may use state bar proceedings as guidelines. See *In re Ruffalo*, 390 U.S. 544, 547 (1968). Federal courts even have authority to disbar an attorney for offenses against a state court. See *In re Grimes*, 364 F.2d 654 (10th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967).

10 ABA CODE, Preface.

11 This note will deal with cases in which an attorney criticized either (1) the opinion of a court or (2) the professional or private conduct of a judge. Although it will include cases in which the criticism was directed at the judicial performance with respect to a pending case, it will not deal with cases in which the right to a fair trial was also an issue. For a thorough discussion of the fair trial issue, see Note, *Judicial Restraints on Attorneys' Speech Concerning Pending Litigation: Reconciling the Rights to Fair Trial and Freedom of Speech*, 33 VAND. L. REV. 499 (1980).

## II. Historical Development of Restrictions on Attorney Criticism of the Judiciary

Even before the enactment of the Code, courts concerned with maintaining respect for attorneys and judges, discouraged criticism of either group.<sup>12</sup> More than a century ago, in *Bradley v. Fisher*,<sup>13</sup> the Supreme Court declared that an attorney was obligated to comply with certain standards which included "maintain[ing] at all times respect due to courts . . . and judicial officers both in and out of court."<sup>14</sup> According to the Court, even an attorney's threat to personally chastise a judicial officer would be grounds for disbaring the attorney.<sup>15</sup>

It was not necessary that the attorney's comments actually lessen public confidence in the legal system as long as they had the potential to do so. The *Bradley* decision was inadequate because it failed to (1) define the boundaries of the ethical standards it sought to maintain, (2) consider the effects of a strict application of these disciplinary regulations on attorneys' first amendment rights, and (3) recognize that a certain amount of criticism of the judiciary would help to maintain the viability of the legal system.<sup>16</sup>

Thirty-six years after *Bradley*, the American Bar Association (ABA) adopted the Canons of Professional Ethics (the Canons), which provided national guidelines for professional conduct.<sup>17</sup> On the one hand, the Canons encouraged attorney criticism of the judiciary. They recognized "the right and duty of the lawyer" to submit his grievances against judicial officers to the proper authorities when sufficient grounds for complaint exist.<sup>18</sup> The Canons stated that "[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession . . . ."<sup>19</sup> On the other hand, the Canons, like the Court in *Bradley*, sought to maintain public confidence in the legal profession by restraining attorney criticism of the judiciary. The Canons required attorneys to observe a respectful attitude toward the courts, "not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance."<sup>20</sup> Under the Canons, attorneys were to maintain the profession's "honor and propriety."<sup>21</sup> Although the Canons purported to lift the ban on attorney criticism of the judiciary, their language remained broad enough to restrict any attorney criticism potentially harmful to the professional image. As a result, most judicial decisions under the Canons prohibited attorney criticism without regard to the actual effect of the statement on the public's confidence in the legal pro-

<sup>12</sup> See note 22 *infra*.

<sup>13</sup> 80 U.S. (13 Wall.) 335 (1872). During the recess of a criminal trial, one of the defense attorneys accosted the presiding judge "in a rude and insulting manner, charging the judge with offering him [the attorney] a series of insults from the bench from the commencement of the trial." *Id.* at 337. Although the judge disclaimed any intention of passing insult, the attorney "threatened the judge with personal chastisement." *Id.*

<sup>14</sup> *Id.* at 355.

<sup>15</sup> *Id.* at 356.

<sup>16</sup> Note, *Attorney Discipline and the First Amendment*, *supra* note 9, at 924.

<sup>17</sup> See DRINKER, *supra* note 4, at 22-26.

<sup>18</sup> ABA CANONS OF PROFESSIONAL ETHICS, No. 1 (1908).

<sup>19</sup> *Id.*, No. 29.

<sup>20</sup> *Id.*, No. 1.

<sup>21</sup> *Id.*, No. 24.

fession.<sup>22</sup>

The Supreme Court challenged this traditional attitude of restraint in 1959. *In re Sawyer*<sup>23</sup> reversed the decision of the United States Court of Appeals for the Ninth Circuit to suspend an attorney from the practice of law.

Harriet Sawyer was a defense attorney in a Honolulu trial of several people charged with conspiracy under the Smith Act.<sup>24</sup> Her clients included members and officers of labor unions, among them members of the International Longshoremen's and Warehousemen's Union (ILWU).<sup>25</sup> Six weeks after the trial had begun, Sawyer made a speech at a meeting sponsored by the ILWU in Honokaa, Hawaii, 182 miles from Honolulu.<sup>26</sup> In her speech, she publicly criticized some "rather shocking and horrible things that went on at trial."<sup>27</sup> She said that the Honolulu trial was really a way to get at the ILWU. She spoke, in general, of the nature of conspiracy prosecutions under the Smith Act and charged that when the Government does not have enough evidence "it lumps a number [of defendants] together and says they agreed to do something."<sup>28</sup> Using the Honolulu trial as an example, she said that some of the Government's witnesses had given prior inconsistent testimony so that the Government could convict. According to Sawyer, "[t]here's no fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case."<sup>29</sup>

Upon recommendation of the Bar Association of Hawaii, the Supreme Court of Hawaii held that Sawyer had engaged in "a willful oral attack upon the administration of justice in [the] United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the [presiding] judge . . . ."<sup>30</sup> The territorial supreme court suspended Sawyer from the practice of law for a year. The Ninth Circuit affirmed<sup>31</sup> and the Supreme Court granted certiorari.<sup>32</sup> A four-member plurality of the Court reversed the decision recognizing that attorney criticism ought to be given maximum protection. Writing for himself and three brothers, Justice Brennan stated that the record was insufficient to support the

22 Florida Bar v. Stokes, 186 So. 2d 499 (Fla. 1966); State ex rel. Florida Bar v. Calhoun, 102 So. 2d 604 (Fla. 1958); State ex rel. Florida Bar v. Edwards, 102 So. 2d 610 (Fla. 1958); *In re Glenn*, 256 Iowa 1233, 130 N.W.2d 672 (1964); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321 (Ky. 1955); *In re Lord*, 255 Minn. 370, 97 N.W.2d 287 (1959); State ex rel. Nebraska State Bar Ass'n v. Nielsen, 179 Neb. 55, 136 N.W.2d 355 (1965), *appeal dismissed and cert. denied*, 383 U.S. 154 (1968); State ex rel. Nebraska State Bar Ass'n v. Rhodes, 177 Neb. 650, 131 N.W.2d 118 (1964); State v. Kavanaugh, 52 N.J. 7, 243 A.2d 225, *cert. denied*, 393 U.S. 924 (1968); State v. Van Dyne, 43 N.J. 369, 204 A.2d 841, *cert. denied*, 380 U.S. 987 (1964); *In re Greenfield*, 24 App. Div. 2d 651, 262 N.Y.S.2d 349, (2d Dep't 1965); Cincinnati Bar Ass'n v. Bednarczyk, 22 Ohio St. 2d 99, 258 N.E.2d 116 (1970); *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1965); *In re Simmons*, 65 Wash. 2d 88, 395 P.2d 1013 (1964), *cert. denied*, 381 U.S. 934 (1965).

23 360 U.S. 622 (1959). Three separate opinions were filed in *Sawyer*. Justice Brennan delivered the plurality opinion in which Chief Justice Warren, Justice Black, and Justice Douglas joined. Justice Frankfurter wrote the dissenting opinion in which Justice Clark, Justice Harlan, and Justice Whittaker joined. Justice Stewart filed a separate concurring opinion.

24 *Id.* at 623.

25 *Id.* at 627.

26 *Id.* at 623.

27 *Id.* at 628.

28 *Id.* at 628-29.

29 *Id.* at 629.

30 *Id.* at 626.

31 *In re Sawyer*, 260 F.2d 189 (9th Cir. 1958).

32 358 U.S. 892 (1958).

finding that the attorney's statement, made out-of-court but during a pending trial, impugned the integrity of the trial judge or reflected adversely upon his impartiality and fairness at trial.<sup>33</sup> According to Justice Brennan, Sawyer's speech was a criticism of the laws governing the Smith Act trial and not an attack on the judges who enforce those laws.<sup>34</sup> Justice Brennan noted that, although Sawyer referred to the Honolulu trial as a "typical, present example of the evils thought to be attendant on such trials,"<sup>35</sup> she avoided phrasing her complaints "in terms of what 'the judge' was doing."<sup>36</sup>

Justice Brennan rejected the argument that, during pending trials, even attorney criticism of the state of the law or judges in general is prohibited:

A lawyer does not acquire a license to do things by not being presently engaged in a case. . . . We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than they might tend to obstruct the administration of justice.<sup>37</sup>

Justice Brennan declared that attorney criticism of the judiciary should be proscribed only in those rare instances when the statement directly "tend[s] to obstruct the administration of justice."<sup>38</sup> He focused on the actual, rather than the potential, effect of the statement.

Justice Frankfurter, in dissent with three other justices, subscribed to the traditional notion that an attorney is not merely another citizen but an officer of the court who must adhere to certain standards of conduct. Although Justice Frankfurter recognized that an attorney has both a professional responsibility and a constitutional right to criticize the courts, he argued that an attorney should be prohibited from going "before a public gathering and fiercely charg[ing] that a trial in which he is a participant is unfair [and] that the judge lacks integrity."<sup>39</sup> Justice Frankfurter characterized Sawyer's statement as a willful attack on the administration of justice in a particular case which "patently impugned, even if by clear implication rather than blatant words, the integrity of the presiding judge."<sup>40</sup> Justice Frankfurter argued that such criticism should not be constitutionally protected regardless of the likelihood that the statement would reach the judge or the jury.<sup>41</sup> Whereas the plurality opinion held that only criticism which actually "tends" to obstruct justice should be prohibited, Justice Frankfurter, stressing the attorney's intent, argued that even criticism which merely "attempts" to prejudice a case or impugn the integrity of a judge should be prohibited.<sup>42</sup>

<sup>33</sup> *Id.* at 626-27.

<sup>34</sup> *Id.* at 631-33.

<sup>35</sup> *Id.* at 633.

<sup>36</sup> *Id.* at 634. The facts of the case state that "the judge" was not mentioned by name in the speech.

<sup>37</sup> *Id.* at 636.

<sup>38</sup> *Id.* For a discussion of the impact of the plurality opinion in *Sawyer*, see Comment, *supra* note 4, at 599-600.

<sup>39</sup> *Id.* at 669 (Frankfurter, J., dissenting).

<sup>40</sup> *Id.* at 652.

<sup>41</sup> *Id.* at 668.

<sup>42</sup> See *id.* at 652. Unlike the other eight justices, Justice Stewart, in his separate opinion, asserted the traditional position that an attorney must conform to "inherited standards of propriety and honor." *Id.* at 646 (Stewart, J., concurring). He concurred, however, with the majority opinion based on the facts of the case. *Id.* at 646.

The Frankfurter standard, like the *Bradley* standard, focused on the potentially harmful effect of the statement.

Despite the decision in *Sawyer*, many lower courts have continued to uphold severe restrictions on attorney criticism of the judiciary.<sup>43</sup> Instead of applying the "tend to obstruct" test of the plurality opinion in *Sawyer*, most courts have continued to apply the traditional standards established in *Bradley* and reiterated in the Canons and the Frankfurter dissent in *Sawyer*. Because the standards governing attorney criticism of the judiciary remained unclear after *Sawyer*, the ABA made another attempt to clarify the scope of the restraints on attorney criticism in the 1969 Code of Professional Responsibility.

### III. Attorney Criticism of the Judiciary Under the Code of Professional Responsibility

Like its predecessor, the Canons, the Code of Professional Responsibility attempts to define attorneys' responsibilities in the administration of justice. To maintain the public's trust in the legal system, the Code holds lawyers to a higher standard of conduct than laymen.<sup>44</sup> The rationale of the Code is that, because the public's respect for the legal system is based upon its respect for individual members of the profession, the slightest misconduct on the part of an attorney tends to lessen public confidence in the system.<sup>45</sup>

#### A. *The Inconsistencies in the Code*

The conflict presented in *Sawyer* was not resolved in the Code. Some Code provisions, like the Brennan standard, encourage attorney criticism of the judiciary; others, like the Frankfurter standard, stifle such criticism. For example, Canon 8 of the Code implicitly protects an attorney's right to com-

43 See, e.g., *In re Whiteside*, 386 F.2d 805 (2d Cir. 1967); *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974); *Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968); *Eisenberg v. Boardman*, 302 F. Supp. 1360 (D. Wis. 1969); *Florida Bar v. Stokes*, 186 So. 2d 499 (Fla. 1966); *In re Terry*, 71 Ind. Dec. 333, 394 N.E.2d 94 (1979), cert. denied, 100 S. Ct. 1025 (1980); *In re Friedland*, 268 Ind. 536, 376 N.E.2d 1126 (1978); *In re Frerichs* 238 N.W.2d 764 (Iowa 1976); *In re Glenn*, 256 Iowa 1233, 130 N.W.2d 672 (1964); *State v. Russell*, 227 Kan. 897, 610 P.2d 1122 (1980); *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980); *State ex rel. Nebraska Bar Ass'n v. Rhodes*, 177 Neb. 650, 131 N.W.2d 118 (1964); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971); *In re Meeker*, 76 N.M. 354, 414 P.2d 862 (1966); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225, cert. denied, 393 U.S. 924 (1968); *State v. Van Duyn*, 43 N.J. 369, 204 A.2d 841, cert. denied, 380 U.S. 987 (1964); *In re Greenfield*, 24 App. Div. 2d 651, 262 N.Y.S.2d 349 (2d Dep't 1965); *Cincinnati Bar Ass'n v. Bednarczuk*, 22 Ohio St. 2d 99, 258 N.E.2d 116 (1970); *In re Simmons*, 65 Wash. 2d 88, 395 P.2d 1013 (1964).

44 ABA CODE, Preamble. The Code consists of three separate but interrelated parts: the Canons which are general statements of standards of professional conduct, the ethical considerations which are aspirational objectives, and the disciplinary rules which prescribe the minimum level of professional conduct below which no lawyer can fall without being subjected to disciplinary action. *Id.*, Preliminary Statement. The Code was divided into these three parts to forestall any attack upon discipline under the Code as arbitrary and therefore unconstitutional. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 11 (1970). (Edward L. Wright chaired the ABA Special Committee on Evaluation of Ethical Standards.)

45 *Id.*, EC 1-5. The Code does not directly regulate the profession in the individual states. By its terms, the Code is designed to be adopted by the appropriate state agencies as a means of regulating the practice of law. *Id.*, Preliminary Statement. As of 1974, 47 states have incorporated the Code—either intact or with minor revisions—into state statutes which are construed by state disciplinary committees and courts. *State Bar v. Semaan*, 508 S.W.2d 429, 432 (Tex. Ct. App. 1974). For a list of state statutes enacting the Code, see PROFESSIONAL RESPONSIBILITY OF THE LAWYER 221 (N. Galston ed. 1977).

ment.<sup>46</sup> The ethical considerations (ECs) under Canon 8 encourage attorney criticism of the judiciary. They state that attorneys are "especially qualified to recognize deficiencies in the legal system"<sup>47</sup> and therefore have a "special responsibility,"<sup>48</sup> not merely a right, to offer commentary about the judiciary to aid in the selection of qualified persons. These ECs encourage the attorney not only to exercise his first amendment rights but also to promote the availability of public information about the quality of the judiciary and the conduct of individual judges. The disciplinary rules (DRs) under Canon 8, however, limit the scope of the ECs. DR 8-102 states that an attorney may "not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office"<sup>49</sup> or "knowingly make false accusations against a judge or other adjudicatory officer."<sup>50</sup>

Other sections of the Code, however, discourage attorney comment, ignoring the attorney's "special responsibility" to educate the public. EC 1-5 states that an attorney "should be temperate and dignified"<sup>51</sup> so that public confidence in the legal system is in no way diminished. EC 8-6 requires that an attorney "be certain of the merits of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."<sup>52</sup> DR 1-102 forbids attorneys from engaging in "conduct that is prejudicial to the administration of justice."<sup>53</sup> Although the Code establishes standards for professional conduct, it fails to define what forms of conduct are "prejudicial to the administration of justice." Because the Code's standards are inconsistent and vague, attorneys are uncertain about the extent of their first amendment protection. An attorney who feels certain that his complaint has "merit," his language is "appropriate," and his criticism is not "petty" may nevertheless refrain from making a statement about a judge. The mere threat of sanctions not only stifles the attorney's first amendment rights but also deprives the public of information about the conduct and the quality of its judicial officers.

### B. *Judicial Decisions Under the Code*

The judicial decisions applying the Code's standards for attorney criticism of the judiciary have been no more consistent than the standards themselves. Some decisions applying the Code's standard of "prejudice to the administration of justice" follow the Frankfurter view, restricting all potentially harmful comments,<sup>54</sup> whereas other decisions reflect the Brennan view,

46 ABA CODE, Canon 8, provides: "A lawyer should assist in improving the legal system."

47 *Id.*, EC 8-1.

48 *Id.*, EC 8-6.

49 *Id.*, DR 8-102(A).

50 *Id.*, DR 8-102(B).

51 *Id.*, EC 1-5.

52 *Id.*, EC 8-6.

53 *Id.*, DR 1-102(A)(5).

54 *See, e.g., In re Shimek*, 284 So. 2d 686 (Fla. 1973); *In re Friedland*, 268 Ind. 536, 376 N.E.2d 1126 (1978); *In re Terry*, 71 Ind. Dec. 333, 394 N.E.2d 94 (1979), *cert. denied*, 100 S. Ct. 1025 (1980); *In re Frerichs*, 238 N.E.2d 764 (Iowa 1976); *State v. Russell*, 227 Kan. 897, 610 P.2d 1122 (1980); *In re Raggio*, 87 Nev. 369, 487 P.2d 449 (1971); *In re Lacey*, 283 N.W.2d 250 (S.D. 1979).



restricting only those comments that actually cause harm.<sup>55</sup>

The courts restricting potentially harmful comments, like the Frankfurter opinion, uphold the traditional ban on attorney criticism of the judiciary. They justify their decisions on one of two bases: (1) the attorney-layman distinction or (2) the need to maintain public confidence in the legal system. These courts have been able to reject any attacks on the constitutionality of restraints on attorney comments by broadly interpreting the Code's language.

The attorney-layman distinction is the first basis frequently cited by courts to justify restrictions on potentially harmful attorney criticism of the judiciary. These courts maintain that, whereas a layman is entitled to all the protection available under the Constitution, an attorney relinquishes certain rights in return for the status he gains when he enters the profession.<sup>56</sup> His right of free speech, at least as far as it is exercised in his professional capacity, is one of the rights he loses.<sup>57</sup>

On the basis of the attorney-layman distinction, the Supreme Court of Nevada upheld the traditional ban on attorney criticism of the judiciary. *In re Raggio*<sup>58</sup> held that public statements of a district attorney criticizing the opinion of the state supreme court warranted reprimand.<sup>59</sup> The court said that it was "never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about the [court's] work and the manner in which the [court] perform[s] it, and [would] protect their right to so express themselves."<sup>60</sup> The court distinguished laypersons from members of the bar who have sworn to uphold professional standards of conduct. It declared that "[c]onformity with those standards has proven essential to the administration of justice."<sup>61</sup> Without mentioning the words spoken by the attorney, the court focused on the potential effect of the criticism, saying that the right of free speech does not give an attorney the right to "denigrate" a court in the eyes of the public.<sup>62</sup>

55 See, e.g., *In re Oliver*, 452 F.2d 111 (7th Cir. 1971); *Polk v. State Bar of Texas*, 374 F. Supp. 784 (N.D. Tex. 1974); *Justices of App. Div. v. Erdmann*, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973).

56 The rationale for holding an attorney to a higher standard of conduct was provided by Judge Cardozo in *People ex rel. Karlin v. Culkan*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928): "Membership in the bar is a privilege burdened with conditions." [Citation omitted.] The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." In *Thread v. United States*, 354 U.S. 278, 281 (1957), the Supreme Court endorsed the views of Judge Cardozo.

57 The Supreme Court of Missouri explained: "A layman may, perhaps, pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics." *In re Woodward*, 300 S.W.2d 385, 393-94 (Mo. 1957) (en banc). *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977) indicates the greater tolerance courts have for criticism by laymen. The defendants in that case described Judge Rinaldi as one of the "10 worst Judges in New York," "incompetent," and "probably corrupt." *Id.* at 373, 376, 366 N.E.2d at 1301, 1303, 397 N.Y.S.2d at 945, 947. The court held that a "[p]laintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Id.* at 380-81, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

58 87 Nev. 369, 487 P.2d 499 (1971).

59 *Id.* at 370-71, 487 P.2d at 500.

60 *Id.* at 372, 487 P.2d at 500-01.

61 *Id.* at 372, 487 P.2d at 501.

62 *Id.* at 371, 487 P.2d at 500.

The Supreme Court of Iowa has also used the attorney-layman distinction to reject an attorney's first amendment claim. *In re Frerichs*<sup>63</sup> held that a statement by an attorney that the state supreme court had refused to address a constitutional issue warranted professional discipline even though the statement was not intended to show disrespect for the court.<sup>64</sup> Although acknowledging the attorney's right and duty to criticize in a manner allowed by the Canons, the court concluded that an attorney, acting in his professional capacity, may have fewer rights of free speech than would a private citizen.<sup>65</sup>

Recently in *State v. Russell*,<sup>66</sup> the Supreme Court of Kansas, restricted the first amendment rights of an attorney when he was acting as a private citizen.<sup>67</sup> In *Russell*, the court publicly censured the attorney for placing in a Kansas newspaper an advertisement uncomplimentary to his opponent in a local political campaign. The court declared that an attorney is bound by the Code in every capacity, whether acting as a lawyer or as a citizen.<sup>68</sup>

The need to maintain public confidence in the legal system is the second basis cited by courts to justify restrictions on potentially harmful criticism. The Supreme Court of Florida, in *In re Shimek*, proscribed language "calculated to cast a cloud of suspicion upon the entire judiciary of the State of Florida."<sup>69</sup> *Shimek* involved an attorney disciplined for having stated in a memorandum filed with the court that a trial judge had avoided the performance of his sworn duty.<sup>70</sup> Similarly, the Supreme Court of South Dakota publicly censured an attorney for publishing in a newspaper complaints "casting doubt on the competence and integrity of the judiciary."<sup>71</sup> *In re Lacey* found that the attorney's statement that "[t]he courts were incompetent and sometimes downright crooked" was not constitutionally protected even though the attorney contended that he had made the statement in good faith and in the spirit of constructive criticism.<sup>72</sup> The court rejected a first amendment argument on the grounds that the attorney had breached obligations imposed upon him by law.<sup>73</sup>

Since the promulgation of the Code, a few lower courts, following the Brennan opinion, have rejected the traditional ban on attorney criticism of the judiciary. Although they do not specifically refer to the *Sawyer* decision, most of these courts base their holdings, as did Justice Brennan, on the absence of any actual harmful effect of the criticism. In *Justices of the Appellate Division, First Department v. Erdmann*,<sup>74</sup> the Court of Appeals of New York reversed a lower court decision to discipline an attorney for statements made in a magazine article. In the article, the attorney criticized trial judges for fail-

63 238 N.W.2d 764 (Iowa 1976).

64 *Id.* at 770.

65 *Id.* at 769.

66 227 Kan. 897, 610 P.2d 1122 (1980).

67 *Id.* at 904, 610 P.2d at 1127.

68 *Id.*

69 284 So. 2d 686, 689 (Fla. 1973).

70 *Id.* at 686.

71 *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979).

72 *Id.* at 251-52.

73 *Id.* at 252.

74 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973).

ing to leave questions of guilt or innocence to juries.<sup>75</sup> He described appellate division judges as "whores who became madams"<sup>76</sup> and claimed they obtained their positions through political patronage or money.<sup>77</sup> The court concluded that isolated instances of disrespect for judges and courts are not subject to professional discipline even when "expressed by vulgar and insulting words or other incivility, uttered or written, or committed outside the precincts of a court."<sup>78</sup>

In *In re Oliver*,<sup>79</sup> the Seventh Circuit reversed a district court decision reprimanding an attorney for his criticisms of the judiciary but refused to go as far as Justice Brennan in upholding all criticism that does not tend to obstruct the administration of justice. *Oliver* involved an attorney who had publicly commented on the district court's opinion in a pending case. He was charged with violating a policy statement of the court prohibiting extra-judicial discussion of pending cases.<sup>80</sup> The Seventh Circuit held unconstitutional a blanket prohibition against all extra-judicial comments by attorneys without regard to whether the comment was or even could be prejudicial to the fair administration of justice.<sup>81</sup> The court limited the "prohibition against dissemination of information to situations where 'there is a reasonable likelihood that such dissemination will . . . prejudice the due administration of justice.'"<sup>82</sup>

In *Polk v. State Bar of Texas*,<sup>83</sup> the United States District Court for the Northern District of Texas defined the types of comments that actually harm. The *Polk* court held unconstitutional an attempt to discipline an attorney for his statements about the criminal case in which he was the defendant on the grounds that such statements were made in his capacity as a private citizen.<sup>84</sup> The court indicated that even statements made by an attorney in a professional capacity would be protected because a private citizen does not lose "his right to free expression when he becomes a licensed attorney."<sup>85</sup> According to the court, a state may not regulate an attorney's free speech rights under the guise of prohibiting professional misconduct<sup>86</sup> unless its exercise will adversely affect a significant state interest—that is, unless the attorney's conduct (1) shows his inability to represent clients competently and honestly or (2) "interferes with the processes of the administration of justice."<sup>87</sup> Unlike earlier courts, the *Polk* court defines conduct affecting "the administration of justice" to include only such conduct as "bribery of jurors, subornation of perjury, misrepresentation to a court or any other conduct which undermines

75 *Id.* at 560, 301 N.E.2d at 427, 347 N.Y.S.2d at 442.

76 *Id.*

77 *Id.*

78 *Id.* at 559, 301 N.E.2d at 427, 347 N.Y.S.2d at 441.

79 452 F.2d 111 (7th Cir. 1971).

80 *Id.* at 112.

81 *Id.* at 114-15.

82 *Id.* at 114, quoting Committee on the Operations of the Jury System of the Judicial Conference of the United States, Report on the Free Press—Fair Trial Issue, 45 F.R.D. 391, 404 (1969).

83 374 F. Supp. 784 (N.D. Tex. 1974).

84 *Id.* at 788.

85 *Id.* at 787.

86 *Id.* at 788.

87 *Id.*

the legitimacy of the judicial processes."<sup>88</sup> By specifying inability to represent clients and interference with the administration of justice as the only bases for restricting attorney criticism of the judiciary, the *Polk* court, like the Brennan opinion in *Sawyer*, focused on the actual effect of the criticism. If a state cannot show actual inability, bribery, perjury, or the like, the restriction will not be upheld.

#### IV. The Balance of Constitutional Rights

As the *Polk* court indicated, in the area of attorney criticism of the judiciary, a balance must be struck between individual first amendment rights and important state interests. Through its interpretations of the first amendment, the Supreme Court has divided speech into two categories: (1) protected speech such as political discussion and religious speech and (2) unprotected speech such as libel and obscenity.<sup>89</sup> A state may regulate unprotected speech if the regulation is rationally related to a legitimate state interest. If speech is protected, however, the reviewing court must balance the speaker's first amendment rights against the government's interests in regulation.<sup>90</sup> The limitations on protected speech must not be "greater than is necessary or essential to protect the particular government interest involved."<sup>91</sup>

The *Polk* court held that attorney criticism of the judiciary is protected speech, because the interests of the attorney outweighed those of the state. Most other courts, however, have shown more concern for maintaining respect for the judicial system than for encouraging criticism of it.<sup>92</sup> As a result, the balance of interests has usually been tipped in favor of the state. A more appropriate test would balance the state's interest in maintaining public confidence in the legal system against both the attorney's interest in free speech and the public's interest in proper official conduct. Balancing the interests in this manner, the scale tips in favor of first amendment rights.

##### A. *The State's Interest: Maintaining Public Confidence in the Profession*

An attorney's first amendment right to criticize the judiciary can be limited by the state only to protect of an overriding state interest. EC 8-6 of the

88 *Id.* The court of appeals, in *Polk*, relied on three Supreme Court cases to reach the conclusion that an attorney's right of free speech can only be restrained by a compelling state interest: *Spevack v. Klein*, 385 U.S. 511 (1967); *NAACP v. Button*, 371 U.S. 415 (1963); *Konigsberg v. State Bar*, 353 U.S. 252 (1957). In *Spevack*, the Court held that the fifth amendment privilege against self incrimination applied to state bar disciplinary proceedings. In *Button* and *Konigsberg*, the Court held that speech may not be regulated under the guise of regulating conduct.

89 See generally Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877 (1973).

U.S. CONST. amend. I provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The first amendment applies to the states through the fourteenth amendment. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

90 See Note, *Attorney's Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and Freedom of Association*, 1977 WASH. U.L.Q. 687.

91 Note, *Professional Responsibility—Trial Publicity—Speech Restrictions Must Be Narrowly Drawn*, 54 TEX. L. REV. 1158, 1165 (1976).

92 See, e.g., *In re Friedland*, 268 Ind. 536, 376 N.E.2d 1126 (1978); *In re Terry*, 71 Ind. Dec. 333, 394 N.E.2d 94 (1979), cert. denied, 100 S. Ct. 1025 (1980); *In re Frerichs*, 238 N.E.2d 764 (Iowa 1976); *State v. Russell*, 227 Kan. 897, 610 P.2d 1122 (1980); *In re Lacey*, 283 N.W.2d 250 (S.D. 1979).

Code attempts to define the state's interest in restricting attorney criticism, stating that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. . . . for unrestrained and intemperate statements tend to lessen public confidence in our legal system."<sup>93</sup> A number of courts have cited EC 8-6 to justify their restrictions on attorney criticism despite first amendment arguments.<sup>94</sup>

Attorney criticism of the judiciary undoubtedly lessens public confidence in the legal system to a greater extent than does criticism by non-lawyers.<sup>95</sup> Because attorneys have special expertise in judicial matters, the public has greater faith in attorneys' comments about the judiciary, even if the attorneys use inappropriate language or make claims of which they are uncertain. The public confidence in attorney criticism of the judiciary is one reason for imposing a higher standard of conduct on attorneys.<sup>96</sup> The state's interest in preserving the public's confidence in the legal system cannot, however, be considered in a vacuum. This interest must be balanced against the interests of the attorney and the public.

### B. *The Attorney's Interest: Free Speech*

The Supreme Court has frequently affirmed the right of the individual citizen to comment on issues even when his remarks are highly critical or in poor taste<sup>97</sup> and even when the legal profession or the judiciary is the subject of the criticism.<sup>98</sup> The Court has justified such criticism on the basis that the legal profession and the judiciary might profit through public debate.<sup>99</sup> Under the rule adopted in *New York Times Co. v. Sullivan*,<sup>100</sup> criticism of individual judges can be classified as protected speech. In *New York Times*, the Court held that a citizen's statements about a public official are constitutionally protected unless there is a showing that the declarant (1) knew the statements were false or (2) published them with intentional or reckless disregard for their truth.<sup>101</sup> The Court observed that free speech was given constitutional protection to assure unfettered interchange of ideas to bring about po-

93 ABA CODE, EC 8-6.

94 See *In re Shimek*, 284 So. 2d 686 (Fla. 1973); *In re Frerichs*, 238 N.E.2d 764 (Iowa 1976); *In re Lacey*, 283 N.W.2d 250 (S.D. 1979).

95 Essay, *Three Discussions of Legal Ethics*, 126 U. PA. L. REV. 452, 468 (1977).

96 *Id.*

97 See, e.g., *Gertz v. Welch*, 418 U.S. 323 (1974); *Eaton v. Tulsa*, 415 U.S. 697 (1974); *Cohen v. California*, 403 U.S. 15 (1971); *Garrison v. Louisiana*, 379 U.S. 64 (1965); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962); *Bridges v. California*, 314 U.S. 252 (1941).

98 See, e.g., *Wood v. Georgia*, 370 U.S. 375 (1962); *Bridges v. California*, 314 U.S. 252 (1941).

99 See *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

100 376 U.S. 254 (1964). In this case, a New York newspaper published an editorial advertisement criticizing Alabama officials' handling of racial matters and seeking financial support for the Negro right-to-vote movement and the Negro student movement. An elected commissioner of Montgomery, Alabama, brought a civil libel action against the publisher of the newspaper and the clergymen whose names appeared in the advertisement. *Id.* at 256. The Circuit Court of Montgomery County awarded \$500,000 to the plaintiff and, on appeal, the Supreme Court of Alabama affirmed the award. *Id.* The Supreme Court of the United States reversed holding that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283.

101 *Id.* at 279-80. "Reckless" conduct is not measured by a reasonable person standard, or by whether a reasonable person would have investigated before publishing. Instead, there must be a showing that the declarant in fact entertained serious doubts as to the truthfulness of the publication. *St. Amant v. Thomp-*

litical and social changes desired by the public.<sup>102</sup> The first amendment requires that debate on public issues be uninhibited, robust, and wide-open. Such debate might well include vehement, caustic, and sharp attacks on the government and public officials.<sup>103</sup>

In evaluating the constitutionality of restrictions on attorney criticism of the judiciary, the main concern is the harm likely to result if attorneys are held to a standard of conduct higher than that imposed upon laymen. The practical effect of a higher standard is a restriction on all attorney criticism of the judiciary. Faced with the possibility of disbarment or suspension, an attorney who considers criticizing the judiciary will generally choose to be silent. This silence not only chills the attorney's first amendment rights but also deprives the public of an invaluable critic. The attorney is ideally situated to understand the workings of the judiciary and to expose its failures.<sup>104</sup> As one commentator has written,

there is a high price paid in leaving to non-lawyers the primary responsibility for educating the lay public about the inadequacies of our courts. In the end, the public may have gained in its impression of lawyers and judges, but it will be blinded to what reform is actually needed in the legal system.<sup>105</sup>

### C. *The Public's Interest: The Right to Know*

Even though the balance between the government's interest in maintaining public confidence in the legal system and the attorney's right to free speech could arguably be tipped in favor of the state, when the public's right to know is added to the balance, the scale tips in favor of increased protection for attorney criticism of the judiciary. The public is affected greatly by the conduct and quality of lawyers and judges. It has an interest, therefore, in being informed about problems in the legal system. Courts have recently recognized that the first amendment guarantees a "right to know," that is, a right to receive information communicated by another person.<sup>106</sup> This right

son, 390 U.S. 727, 731 (1968). A mere showing that the utterances were motivated by ill-will toward the defamed person is not enough. *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964).

102 376 U.S. at 269.

103 *Id.* at 270.

104 See ABA CODE, EC 8-1. See generally Note, *Attorney Discipline and the First Amendment*, *supra* note 9, at 926; Note, *supra* note 90, at 688; Comment, *supra* note 4, at 601.

105 Dershowitz, *Betraying the Bill of Rights*, N.Y. Times, Nov. 28, 1976, § 7, at 1, col. 1.

106 For cases that have recognized the right to know, see, e.g., *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1973) (right to receive mail from prisoners); *Kleindienst v. Mandel*, 408 U.S. 753, 762, 765 (1972) (right to receive information from an excluded alien); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (right to distribute informational literature); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (right of viewers and listeners to obtain information of public concern); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (right to read or view obscene materials in the privacy of one's home); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (right to receive information about and use contraceptives); *Lamont v. Postmaster General*, 381 U.S. 301, 304 (1965) (right to receive "communist political propaganda"); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (right to receive religious information).

For a general discussion of the right to know, see Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Emerson, *Legal Foundations of the Right to Know*, *supra* note 89; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245; Note, *supra* note 90, at 706-08; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971).

assumes that society benefits from informed decisionmaking. As the Supreme Court observed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>107</sup> "people will perceive their own best interests if only they are well enough informed."<sup>108</sup> The right to know includes (1) the right to obtain written and spoken communications and (2) the right to obtain information as a basis for transmitting ideas and facts to other people.<sup>109</sup> Although similar to the right to communicate, the right to know should be recognized as an independent right. Situations may arise in which the interests of the communicator conflict with those of the listener or in which the communicator may not be in a position to assert his rights.<sup>110</sup> The right to know is important not only for truthseeking and collective decisionmaking but also for effectuating social change without violence or coercion.<sup>111</sup>

On numerous occasions, the Supreme Court has recognized a constitutional right to know. In *Lamont v. Postmaster General*,<sup>112</sup> the Court upheld the right of citizens to receive foreign "propoganda" without notifying governmental authorities. In *Virginia Board of Pharmacy*,<sup>113</sup> the Court recognized the right of the consumer to receive price advertisements for standard prescription drugs.

The right to know is not, however, as widely accepted as the right to free speech: its contours remain obscure. The Supreme Court has not always recognized the right to know when balancing private interests against governmental interests. In *Zemel v. Rush*,<sup>114</sup> for example, the Court upheld blanket restrictions on the right of American citizens to travel to Cuba. In *Kleindienst v. Mandel*,<sup>115</sup> it refused to recognize the right of American citizens to hear a lecture by a foreigner who had been denied a visa.

Justifying an infringement of the right to know has become increasingly difficult, however. For example, in *Bigelow v. Virginia*,<sup>116</sup> the Court said that a reasonable regulation that serves a legitimate public interest was sufficient to defeat the recipient's right to know. In *Virginia Board of Pharmacy*, however, the Court required a stronger state interest to restrict pharmaceutical price advertising. It indicated that state regulations on commercial speech would be upheld if the speech (1) is false, deceptive, or misleading or (2)

107 425 U.S. 748 (1976). In *Virginia Board of Pharmacy*, the Supreme Court held that a Virginia statute barring advertisement of prescription drug prices violated the first and fourteenth amendments and could not be justified on the basis of the state's interest in maintaining the professionalism of its licensed pharmacists.

108 *Id.* at 770.

109 Emerson, *Legal Foundations of the Right to Know*, *supra* note 89, at 2.

110 *Id.*

111 *Id.* It has been suggested that the right to know be adopted as the principle basis for the constitutional protection afforded by the first amendment. Alexander Meiklejohn is the primary source of this theory. He maintains that the private citizen, in his capacity as sovereign master over the public servants of the government, has the right to receive information. That right is "the exclusive justification" for according all persons freedom of speech and other first amendment rights. *Id.* at 4. Insofar as a communication contributes to the public's right to know, it is in his view entitled to absolute protection under the first amendment. *Id.*

112 381 U.S. 301, 304 (1965).

113 425 U.S. 748 (1976).

114 381 U.S. 1 (1945).

115 408 U.S. 753 (1972).

116 421 U.S. 809 (1975).

proposes an illegal transaction.<sup>117</sup> More recently, in *Bates v. State Bar of Arizona*,<sup>118</sup> the Supreme Court expanded the public's right to receive information while simultaneously eliminating restrictions on commercial speech.

In *Bates*, the Court was presented with the question of whether a state may prevent the publication in a newspaper of an attorney's truthful advertisement for routine legal services. Prior to 1977, the Code of Professional Responsibility limited the attorney's right to advertise.<sup>119</sup> The courts upheld the disciplinary rules prohibiting attorney advertising on the basis that such advertising would stir up litigation, encourage misrepresentation, and reduce the image of the profession in the eyes of the public.<sup>120</sup> Regulation of an attorney's right to advertise had been considered a valid exercise of the state's police power necessary to maintain the integrity of the profession.<sup>121</sup>

The *Bates* decision ended the ban on attorney advertising. The Court held that application of the disciplinary rule against the appellants violated the first amendment.<sup>122</sup> According to the Court, the disciplinary rule inhibited the free flow of commercial information and kept the public ignorant of the availability of legal services.<sup>123</sup> Rejecting the arguments that attorney advertising would undermine professionalism<sup>124</sup> and increase litigation, the Court said that the bar was obligated to aid consumers in intelligently selecting attorneys to serve their needs.<sup>125</sup>

*Bates* focused not on the rights of the attorney but on the "right of the public as consumers and citizens to know about the activities of the legal profession."<sup>126</sup> Relying on the attorney-layman distinction, courts had summarily dismissed attacks on advertising restrictions.<sup>127</sup> By concentrating in-

117 425 U.S. at 771-72. For a complete discussion of commercial speech as a protected right, see Note, *Solicitation By Attorneys: A Prediction and A Recommendation*, 16 HOUS. L. REV. 452, 459-64 (1979); Comment, *Commercial Speech And the Limits of Legal Advertising*, 58 OR. L. REV. 193 (1979).

118 433 U.S. 350 (1977). The attorneys in *Bates* operated a legal clinic which handled routine matters for standard fees. In an effort to increase business and attract more clients, they placed an advertisement in a local newspaper. *Id.* at 354. The state bar association found the advertisement violative of the state's code. *Id.* at 356. For a complete discussion of *Bates*, see Note, *Bates v. State Bar of Arizona: The First Amendment Right of Attorney Advertisement of Routine Legal Service Fees*, 5 TEX. SO. L. REV. 198 (1978); Comment, *supra* note 117, at 210-13.

119 ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1975) provided, in relevant part:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

120 See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1184 (1972).

121 See, e.g., *Hartford County Grievance Comm. v. Cole*, 22 Conn. Supp. 86, 161 A.2d 590 (1960); *In re Hallett*, 58 Ill. 2d 239, 319 N.E.2d 48 (1974); *In re Braun*, 61 N.J. 119, 293 A.2d 186 (1972); *In re Rothman*, 12 N.J. 528, 97 A.2d 621 (1953); *In re Connelly*, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963); *In re Anonymous*, 32 App. Div. 2d 37, 299 N.Y.S.2d 240 (1969). See generally DRINKER, *supra* note 4, at 210-20.

122 433 U.S. at 384.

123 *Id.* at 365. The Court in *Bates* found that the conclusion that the disciplinary rule on advertising "is violative of the First Amendment might be said to flow *a fortiori*" from the holding in *Virginia Board of Pharmacy*. *Id.* For a discussion of *Bates* in relation to the development of commercial speech as a protected right, see Note, *supra* note 117, at 457-64.

124 433 U.S. at 368-72.

125 *Id.* at 375-78.

126 *Id.* at 358.

127 It was generally held that the ethics of the legal profession forbade attorneys from advertising their skills as shopkeepers advertise their wares. Prior to 1976, courts restricted attorney criticism on the grounds that attorneys practice a profession whereas shopkeepers conduct a trade. See DRINKER, *supra*



stead on the public's right to know and to receive information, the *Bates* court rejected the advertising ban while implicitly granting attorneys commercial speech privileges. The Court thus avoided directly addressing both the free speech issue and the attorney-layman distinction.

The rationale of *Bates* in affording some degree of first amendment protection to commercial speech by attorneys can be extended to other forms of speech by attorneys. An attorney's right to criticize the judiciary, like his right to advertise, warrants first amendment protection not only because an attorney, as an individual citizen, has a right to free speech, but also because the public has a right to receive information about the judiciary. An attorney's right to criticize the judiciary exceeds his right to advertise because criticism is not subject to any commercial limitations. To suppress all attorney criticism because some criticism might be harmful defeats the spirit of the first amendment.

## V. Recommendations

Changes in the law and in the role of the attorney in society warrant a reevaluation of the limitations on attorney criticism of the judiciary. The Code's restriction of conduct "prejudicial to the administration of justice" is too vague. The time is ripe for the Supreme Court and the organized bar to reconsider their positions with respect to attorney criticism of the judiciary.

### A. *The Role of the Supreme Court*

Attorney criticism of the judiciary raises a question of jurisprudential importance. It is a recurring constitutional issue and, as such, warrants consideration by the Supreme Court. The Court must develop a uniform standard for measuring attorney liability, consistent with its position in *Bates*. There are two possible approaches for the Court to follow in developing a new standard. It can consider the question of attorney criticism in light of the right to know doctrine—an approach that flows logically from its decision in *Bates*. Alternatively, the Court can resolve the question on the basis of the attorney-layman distinction—an issue clearly foreshadowed but left unanswered in *Bates*.

The time has come for the Court to face the question of whether to eliminate the attorney-layman distinction and hold that first amendment protection extends to attorney criticism of the judiciary. Such criticism can be measured by the standards governing a layman's comments about a public official. There is both state and federal authority for finding the *New York Times* rule applicable to attorney criticism of the judiciary. In *Eisenberg v. Boardman*<sup>128</sup> and *State Bar of Texas v. Semaan*,<sup>129</sup> the courts recognized that

note 4, at 5, 210-11. Cases distinguishing the legal profession from a trade include *Hartford County Grievance Comm. v. Cole*, 22 Conn. Supp. 86, 161 A.2d 590 (1960); *State ex rel. Hunter v. Crocker*, 132 Neb. 214, 271 N.W. 444 (1937); *In re Rothman*, 12 N.J. 528, 97 A.2d 621 (1953); *In re Duffy*, 19 App. Div. 2d 177, 242 N.Y.S.2d 665 (1963).

<sup>128</sup> 302 F. Supp. 1360 (D. Wis. 1969). In *Eisenberg*, the attorneys publicly circulated statements accusing a district court judge of criminal misconduct and caused advertisements to be run in newspapers soliciting complaints about the judge. *Id.* at 1361. They also issued a press release about the judge which

attorneys who made derogatory statements about public officials, including judges, were protected under the first and fourteenth amendments from criminal and civil sanctions, unless the statements were made with knowledge of their falsity or with reckless disregard for the truth. In *Semaan*, the Texas Court of Civil Appeals declared that the *New York Times* protection "undoubtedly extends on the same terms to lawyers, at least for utterances made outside the course of judicial proceedings."<sup>130</sup> Although the courts have not applied the *New York Times* rule to disciplinary proceedings, *Semaan* recognized that the Supreme Court's language in *Garrison v. Louisiana*<sup>131</sup> indicated that any restriction upon the free flow of information to the public concerning the performance and qualifications of public officials is likely to be held unconstitutional.<sup>132</sup> *Semaan* noted that constitutional protection in other areas—specifically the privilege against self-incrimination—is available to an attorney in a disbarment proceeding.<sup>133</sup> By applying the *New York Times* rule to attorney criticism of the judiciary, the Court will not only establish a uniform standard for regulating attorney criticism but also destroy the traditional attorney-layman distinction with regard to free speech.

If the Court hesitates to eliminate the attorney-layman distinction, it can nevertheless expand the attorney's first amendment right and acknowledge the public's right to know by applying the *Bates* rationale to the question of attorney criticism of the judiciary. In *Bates*, the Court recognized the right of attorney advertising only after the right to advertise was afforded to other professionals. Similarly, having recognized the right of the layman to criticize a public official, the Court can take the next step and remove the restrictions on attorney criticism of the judiciary. Attorneys do not surrender their first amendment rights when they take their professional oaths.<sup>134</sup> In addition, attorneys are best able to criticize the legal profession because of their position within it. Their special insight elevates their right to criticize to a duty to inform the public.

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he was forced to read in open court. *Id.* at 1362. Even though the court recognized and supported the *New York Times* standard for cases of attorney criticism of the judiciary, it disciplined the attorneys declaring:

As statements made they were protected speech, but the complaint clearly does not stop with charging the making of the statements. . . . Rather it charges a course of conduct which is alleged to be unprofessional, and the fact that speech is intermingled with conduct does not endow the conduct with constitutional protection.

*Id.* at 1364-65.

129 508 S.W.2d 429 (Tex. Civ. App. 1974). In response to an editorial in a local newspaper criticizing the conduct of a district court judge at trial, an attorney wrote a "letter to the editor" agreeing with the editorial and comparing the judge unfavorably to other named judges in regard to knowledge of the law and impartiality. *Id.* at 431. The court said that the criticism related entirely to the writer's opinion of the qualifications of the judge and no issue of falsity or improper motive was involved. *Id.* at 432.

130 *Id.* at 432-33.

131 379 U.S. 64 (1964).

132 508 S.W.2d at 433.

133 *Id.*

134 See, e.g., *Spevack v. Klein*, 385 U.S. 511 (1967) (recognizing an attorney's privilege against self-incrimination in state bar disciplinary proceedings); *NAACP v. Button*, 371 U.S. 415 (1963) (recognizing the right of NAACP staff attorneys to advise prospective litigants to seek legal assistance and to refer them to particular attorneys); *Konigsberg v. State Bar*, 353 U.S. 252 (1957) (recognizing the right of bar applicants to refuse to answer questions about their political beliefs or associations).

### B. *The Role of the American Bar Association*

Although the issue of attorney criticism of the judiciary will probably be resolved by the Court, the American Bar Association can offer timely comments on the role of the organized bar in removing the ban on attorney criticism of the judiciary. The ABA is currently revising the Code of Professional Responsibility. The proposed Model Rules of Professional Conduct will have a statutory effect in states in which they are adopted.<sup>135</sup> The ABA should, therefore, reevaluate its current position on attorney criticism in light of the recent Supreme Court decisions on attorney speech and include an appropriate standard in the Model Rules.

The proposed Model Rules contain only one provision addressing attorney statements about the judiciary. Rule 10.2 provides:

(a) A lawyer shall not knowingly make a false statement concerning the qualifications of a judge or other adjudicatory officer or of a candidate for election or appointment to a judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Rule 10.2 combines several disciplinary rules and ethical considerations in the Code. The language of rule 10.2(a) is almost identical to that of DR 8-102, combining the subsections of the disciplinary rule into one concise sentence.<sup>136</sup> The comment following rule 10.2, however, substantially improves the Code's language. The comment recognizes that the public relies upon the opinions of attorneys in evaluating the professional and personal fitness of candidates for judicial office. The comment encourages "honest and candid opinions" about judges and judicial officers, restricting only "false statements" because they "unfairly undermine public confidence in the legal system."<sup>137</sup> Whereas the Code refuses to justify "[c]riticisms motivated by reasons other than a desire to improve the legal system,"<sup>138</sup> the Model Rules permit honest opinions regardless of the attorney's motive.

Nonetheless, the Model Rules are concerned about maintaining public confidence in the legal system. Unlike the Code, however, which restricts all potentially harmful statements, the Model Rules restrict only false statements which harm the public image of the profession. The Model Rules echo the language of *New York Times*, restricting only knowingly false statements. Because the language of the Model Rules clarifies the ambiguous and restrictive language of the Code, the states should adopt the Model Rules soon after their promulgation.

## VI. Conclusion

As a guardian of public interests, the organized bar has a duty to inform the public of the activities of the judiciary and the qualifications of its offi-

135 PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT, American Bar Association Commission on Evaluation of Professional Standards (Discussion ed. Jan. 30, 1980). The Commission plans to submit a final draft of the Model Rules to the ABA House of Delegates in 1982.

136 PROPOSED ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 10.2.

137 *Id.*, Comment.

138 ABA CODE, EC 8-6.

cials. The proposed Model Rules uphold that duty by permitting "honest and candid" attorney criticism of the judiciary. As the guardian of constitutional privileges, the Supreme Court also has a duty to eliminate restrictions on attorneys' right to free speech and the public's right to know. In *Bates*, the Court held that a state supreme court cannot, through the application of a disciplinary rule, abridge an attorney's right to commercial speech when the public's right to know is involved.<sup>139</sup> Similarly, the Court can no longer justify applying disciplinary rules to restrict an attorney's right to criticize the judiciary, especially when such restriction would also abridge the public's right to know. As the Supreme Court of Wisconsin observed almost fifty years ago,

[c]ourts would be entering upon a dangerous field if they assumed to disbar attorneys because of criticism of courts based upon improper motives. It best conforms to the spirit of our institutions to permit everyone to say what he will about courts, and leave the destiny of courts to the good judgment of the people.<sup>140</sup>

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139 433 U.S. at 384.

140 *In re Cannon*, 206 Wis. 374, 409, 240 N.W. 441, 455 (1932).